



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 24, 2004

Ms. Mary D. Marquez
Legal/records Manager
Capital Metro Transportation Authority
2910 East Fifth Street
Austin, Texas 78702

OR2004-5194

Dear Ms. Marquez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204013.

The Capital Metropolitan Transit Authority ("Capital Metro") received a request on April 7, 2004, from Kleinfelder for copies of the four winning bid proposals for a specific contract. On April 20, 2004, Capital Metro received a request from Professional Service Industries, Inc. ("PSI") for copies of four bid proposals for the same contract, including Kleinfelder's bid proposal. You assert that the requested information may be excepted from disclosure under section 552.110 of the Government Code but take no position and make no argument regarding this claim. In addition, pursuant to section 552.305 of the Government Code, you notified the companies whose proprietary interests may be implicated by the request: PSI; Fugro South, LP ("Fugro"); HBC/Terracon ("HBC"); Rodriguez Engineering Laboratories ("REL"); and Kleinfelder. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). PSI indicated in its response to its notice that it does not object to the disclosure of any information in its proposal. HBC, REL, and Kleinfelder claim that some of their information is excepted from release under section 552.110. We have considered all claimed exceptions and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Fugro has not submitted to this office any reasons explaining why its information should not be released. Therefore we have no basis for concluding that Fugro's information constitutes proprietary information. *See* Gov't Code § 552.110; Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, we determine that Capital Metro may not withhold Fugro's bid proposal pursuant to section 552.110 of the Government Code.

Next, we note the presence of federal tax return information in the documents submitted by Capital Metro. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."¹ This section encompasses information protected by other statutes. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. Therefore, Capital Metro must withhold federal tax return information under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code.

We also note the presence of e-mail addresses obtained from the public in the submitted information relating to Fugro. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
- (c) Subsection (a) does not apply to an e-mail address:
 - (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

¹The Office of the Attorney General will raise mandatory exceptions like sections 552.101 and 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). The submitted information includes two e-mail addresses of members of the public that do not fall within subsection (c) of section 552.137. You do not inform us that a member of the public has affirmatively consented to the release of either of these e-mail. Capital Metro must, therefore, withhold these e-mail addresses, which we have marked, under section 552.137.

We now address the claims of HBC, REL, and Kleinfelder under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the

business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. See Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. Cf. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). An interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of requested information. See Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

HBC claims that its financial and client information are protected under section 552.110. Having considered HBC's arguments, we find that the company has established that release of its client information would cause the company substantial competitive harm. Therefore, Capital Metro must withhold the marked client information under section 552.110(b). However, HBC has not demonstrated that release of its financial information would cause it to suffer competitive harm. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Therefore, we determine that section 552.110(b) is not applicable to HBC's financial information. Furthermore, we find that HBC has not shown that its financial information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim. Thus, we are unable to conclude that section 552.110(a) applies to any of the HBC's financial information. *See* ORD 402.

We next consider the arguments of REL and Kleinfelder. Each company states that it wants to protect its financial information, as well as information relating to personnel and experience. We find that neither REL nor Kleinfelder has established that the information it wishes to protect meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. Thus, we are unable to conclude that section 552.110(a) applies to any portion of REL's or Kleinfelder's bid proposals. *See* ORD 402. Furthermore, neither company provides an argument to support withholding its bid proposal under section 552.110(b). Accordingly, we determine that this information is not excepted from disclosure under section 552.110(b) of the Government Code. *See* Open Records Decision Nos. 661; 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110).

In summary, Capital Metro must withhold federal tax return information under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The marked e-mail addresses in the Fugro documents must be withheld under section 552.137. Capital Metro must also withhold HBC's marked customer information under section 552.110(b). The remainder of the requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. David Floyd
Assistant Attorney General
Open Records Division

WDF/sdk

Ref: ID# 204013

Enc. Submitted documents

c: Ms. Susan E. Charles
Kleinfelder
3601 Manor Road
Austin, Texas 78723
(w/o enclosures)

Mr. John A. Wooley
Fugro South
8613 Cross Park Drive
Austin, Texas 78754
(w/o enclosures)

Mr. Garrett Smith
Professional Service Industries
1901 South Meyers Road, Suite 400
Oakbrook Terrace, Illinois 60161
(w/o enclosures)

Mr. Donald L. O'Connor
Rodriguez Engineering Laboratories
13809 Turbine Drive
Austin, Texas 78728
(w/o enclosures)

Mr. James G. Bierschwale
HBC Terracon
5307 Industrial Oaks Boulevard, Suite 160
Austin, Texas 78735
(w/o enclosures)